No. 2393

IN

The United States Circuit Court of Appeals

for the Ninth Circuit

THE STEAMER "SAMSON" and BARGE No. 8, BARGE No. 9 and BARGE No. 27

COLUMBIA CONTRACT COMPANY,
a Corporation
CLAIMANT AND APPELLANT

SHAVER TRANSPORTATION COMPANY,
a Corporation
LIBELANT AND APPELLEE

STANDARD OIL COMPANY OF CALIFORNIA,
a Corporation
RESPONDENT IN PERSONAM

Reply Brief on Behalf of Claimant and Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

TEAL, MINOR & WINFREE
ROGERS MacVEAGH
Proctors for Claimant

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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Reply Brief on Behalf of Claimant and Appellant

Appeal from the District Court of the United States for the District of Oregon.

In this case the testimony on behalf of the libellant, except as to the amount of damages and except the rebuttal testimony on the ques-

tion of negligence, was taken before Judge Cushman. The rebuttal testimony and all the testimony in regard to damages was taken before a referee, so that Judge Cushman never saw the witnesses nor heard the witnesses testify in regard to damages.

The rule of law is clearly stated by this court in *Spencer v. The Dalles, P. & A. Navigation Co.*, 188 Fed. 867, wherein the court says:

"No useful purpose could be subserved by an extended discussion here of the question of fact whether the Charles R. Spencer or the Dalles City was the more to blame for the collision. The most that can be said for the appellant is that the voluminous testimony is highly conflicting, and that it is entirely possible to take the view that the Dalles City was wholly at fault, or that the Charles R. Spencer was alone responsible for the accident, or that the negligence of both vessels contributed thereto. We have the testimony of a number of witnesses in support of any one of the three possible views, and *there is nothing inherently improbable in any of the theories, nor is there any admitted or incontrovertible fact or circumstance which is wholly inconsistent with any one of such theories.* It is clearly a case of conflicting oral testimony, where it cannot be said that there is a strong preponderance with either party. The District Judge heard the witnesses testify, and

observed their demeanor while upon the stand. His finding upon the conflicting evidence was that the Charles R. Spencer alone was responsible for the collision, and that the Dalles City was wholly without fault. Under the well-settled rules of appellate procedure, the finding ought not, under the circumstances, to be disturbed.

In The Alijandro, 56 Fed. 621, 6 C. C. A. 54, we have said:

> " 'The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the District Judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed unless it clearly appears that the decision is against the evidence. The Albany, (C. C.) 48 Fed. 565, and authorities there cited.' "

The appellee, page 8 and following, claims the location of the oil barge at anchor after the collision clearly establishes which party was at fault. The appellant does not concede that the location of the oil barge is a controlling factor, but it does claim that the location of the oil barge confirms the contention of the appellant.

The testimony shows that the oil barge was anchored betwten 150 and 300 feet from the Oregon shore, tailing down stream into Prairie Channel; the contention of the appellee is that

the oil barge did not drift, after it was cut loose from the "Henderson," a distance of more than its own length. It is conceded that the oil barge was going at the time of the collision at a speed of three miles an hour, that she was cut loose absolutely and immediately from the "Henderson" and that she did drift to some extent; the appellee claims that her anchors were down within thirty seconds after the crash; that she was a "helpless floating mass"; that the bottom was good holding ground; that the anchors were heavy and that the oil barge did not drag them. The appellee further claims that the pilot of the oil barge had ordered the boatswain to stand by the anchors before the collision.

It is true that Sullivan testifies, page 158, that after he blew the second whistle, he told the "quartermaster" to stand by his anchors; he admits, page 159, that he did not so testify before the inspectors and that he was asked to state all orders which he gave. As a matter of fact, the party who let go the anchors was not the quartermaster at all, but the boatswain, Martinson. The quartermaster was Kalberg. His testimony is found on page 2016 and following; he was at the wheel and remained at the wheel, and he was the only person on the oil barge or the "Henderson" who heard the second passing signal answered by the "Samson." Martinson testifies that Sullivan gave him no orders to stand by the anchors, and on page 112 he says that

the only order which he can remember is when the pilot sang out "Let go the anchor." It is admitted that before the inspectors Sullivan testified, page 197, "it was in *the neighborhood of five minutes after the collision before the oil barge came to anchor* so that it was safe and he could look around," and on page 199 he testified, also before the inspectors, that at the time he had time to look around, the "Henderson" had not sunk and her electric lights were burning and *that after he looked around it was two or three to five minutes before the "Henderson" sank.* The oil barge, therefore, drifting five minutes after the collision and before she same to anchor, would have drifted a distance of 1056 feet; and, if she drifted only two and one-half minutes, she would have drifted 528 feet. It is conceded that when at anchor she had out forty fathoms of chain and was anchored in water about forty feet deep. This conclusively shows that she drifted after the anchors were let go and the distance that she drifted, according to the testimony of the pilot himself, could not have been less than 528 feet and may have been as much as 1056 feet. At all events it is clear that after the oil barge came to anchor she was much farther from the "Henderson" than the "Samson," for her lifeboat sent to rescue the passengers from the "Henderson" did not arrive at the "Henderson" until after the passengers and crew had been rescued. Indeed, it may be said to be

a physical impossibility for the oil barge to have drifted for the time which Sullivan claims without having run aground, if the collision took place where Sullivan claims it occurred and where the appellee contends it occurred. In truth, the order to drop the anchors was not given immediately after the collision, Kayser, who was awakened by the crash, admits that the anchors were not dropped until after he jumped out of bed and ran upon deck. (Apostles, pp. 14 and 15.) Captain Sorley (Apostles, pp. 2039-2040) testifies that he gave the order to let go the anchors and that about the same time he heard a like order given forward. He, also, was asleep at the time of the crash and did not give the order until after he got on deck. Crossen, the watchman on the "Henderson," testifies (Apostles, p. 1325) that he *was on the oil barge probably one-half a minute before he heard the anchors let go, and on page 1235 he testifies that it was quite a while before the lines parted.* The physical fact cannot be disputed that if the collision had occurred at the place where the appellee claims it occurred and the oil barge had drifted as long as even two minutes, the oil barge would have been on the shore before she came to anchor. On the other hand, if the collision occurred where the appellant claims it occurred and the oil barge had drifted for five minutes she would have gotten as near the shore

as she was when found at anchor the next morning and would have drifted in that direction.

The appellee in its brief, page 23 and following, claims that the position of the "Henderson" also indicates that the collision was on the Oregon side; the appellee ignores in this contention the evidence of its own witnesses. They testify that at the time of the collision the "Henderson" was backing and that she continued to back after the collision. The appellee claims that the collision occurred within a few feet of where the oil barge was found at anchor. It is conceded that the "Henderson" came to rest on the sands below the point of Tenas Illihee Island. Upon what principle did the oil barge when it anchored tail down along the Oregon shore and the "Henderson" drift almost at right angles to the Oregon shore? Witnesses for the appellee testify that the "Henderson" was backing for not more than one minute prior to the collision and continued to back until her machinery was stopped by the water; she was backing under a port helm. This would tend, of course, as long as the backing continued, to carry the "Henderson" toward the Washington shore.

It is admitted that the "Samson" took hold of the wreck of the "Henderson"; *it is not denied* that *she nosed and pushed and pulled her over toward the Tenas Illihee shoals.*

Jordan in his testimony (Apostles, p. 606) states that in his opinion, the "Henderson"

drifted and was towed after the "Samson" got a line on her, two-thirds of the way across the river. Goodell (Apostles, p. 804) testifies that, in his judgment, the "Samson" dragged the "Henderson" 600 or 700 feet. Church (p. 1072) testifies that the "Samson" kept working ahead and shoving the "Henderson" toward the Oregon shore. It is significant that this testimony is not denied by any witness for the appellee; none of the officers or crew of the "Henderson" was called to deny the testimony of these witnesses to the effect that the "Samson" put a line on the "Henderson" and pulled and pushed the "Henderson" toward the shore of Tenas Illihee Island. Every witness who reached the "Henderson" after the collision and before the "Samson" got the line on the "Henderson" testifies that the "Henderson" at that time was above the point of Tenas Illihee Island.

The appellee also contends that the hole in the port side of the "Henderson" also corroborates the appellee. There can be no question under the evidence in this case that this hole was made by the center barge of the "Samson's" tow. The injury to this barge fully establishes this fact; the testimony of the eye witnesses on the "Samson" corroborates this evidence. The testimony on behalf of the appellee to the effect that even if the hole was made by the port barge, as contended, the center barge would have struck the "Henderson" further aft, further corrobor-

ates this evidence. It must be remembered that the appellee admits that just before the collision, under orders from Sullivan, the "Henderson" was stopped and backed with the helm to port. This would have thrown the stern of the "Henderson" still more in the path of the rock barges. The "silent evidence of the collision"; that is to say, the anchorage of the oil barge, the location of the wreck of the "Henderson" and the hole in her port side, fairly and forcibly corroborate the contention of the claimant and are wholly inconsistent with the claim of the appellee.

ORAL TESTIMONY

Appellee, page 31 and following, states that Sullivan, Kalberg, Martinson and Stayton, officers of the oil barge and "Henderson," and Eddie Grove, Loaland, Dahl and Ole Grove, fishermen, observed the course of the "Henderson" and oil barge prior to the collision and unite in saying that the "Henderson" and oil barge hauled well over to the Oregon shore and gave the "Samson" plenty of room. So far as Sullivan, Kalberg and Martinson are concerned, we admit that they were in a position to know what the course of the oil barge and "Henderson" was, and Stayton upon the "Henderson" was also in position to observe and know the course pursued. It must be remembered, however, that upon examination before the inspectors, Stayton locates the collision

as on the Puget Island side of the range line (Apostles, pp. 517, 518, 519, 520) and changes his testimony after observances made after the collision. The other witnesses, Ole Grove and Dahl, were, as they say, at the tow head, 900 feet from the range line and on the Washington side thereof and three-quarters of a mile from the vessels at the time of the collision. The night was dark, —so dark that Stayton on the "Henderson" could not see Sullivan on the oil barge, 190 feet away. The other two fisherman, Grove and Loaland, were three-quarters of a mile to a mile away. They had no reason to observe the course of the "Henderson" and oil barge. The appellant respectfully submits that these fishermen were *not "eye witnesses"* at all; that they did not actually see the collision, or, if they saw the collision, they were so far away that it was impossible for them to say where the collision took place. Testimony of this character condemns itself. When a man testifies that on a dark night he can locate vessels in a collision when the collision occurred over three-quarters of a mile away from him, common experience teaches us that such testimony cannot be believed. Sullivan (Apostles, p. 107) testifies that he was on a course parallel with the range line and not more than 500 to 600 feet below the line on the Oregon side. Stayton admits, as has been said (Apostles, p. 507), that in his judgment the center barge should have struck the "Hender-

son," and on page 517, before the inspectors, he testifies that the collision occurred right below the seining ground where there is a slough and some piling; that where the vessels hit was abreast of the seining ground near a little slough which runs in there with some piling at the end of it. On the same page he testifies that he judged this was the place of the collision from the location of the oil barge the next morning; on page 519, before the inspectors, he testified that the accident took place in around that little swale, that little slough there, and that there was some piling at the end of it. On the same page he testifies that that testimony was correct when he gave it. The oral testimony of Stayton, therefore, corroborates the contention of the appellant rather than that of the appellee. Martinson, as shown in our former brief, admits that he was not paying any attention to his duties as lookout. Of the so-called "eye witnesses" named by the appellee, therefore, it may be said that the only testimony which sustains the appellee is that of Sullivan and Kalberg, for the testimony of the fishermen should be eliminated as too improbable for belief, and Martinson admits that he was not paying any attention, and Stayton admits that the next morning after the accident he located the collision practically at the point at which Jordan locates it.

On the other hand, on behalf of the appellant, there is the testimony of *Jordan,* whose testimony

is entitled to at least as much credit as that of Sullivan. He does not contradict himself oftener than Sullivan, nor does he contradict himself in matters of such grave importance as those in which Sullivan contradicts himself. Then there is a witness, Peterson, the helmsman. *Peterson* was examined and cross-examined before the inspectors by Inspector Edwards; again by Mr. Shepard, who appeared as attorney for the "Shaver" and for Captain Sullivan; and again by Inspector Evans; and still again by Mr. Shepard. (Apostles, pp. 1198 to 1225.) This witness unquestionably told what he believed was true. His testimony is not wholly in accord with that of Jordan. It is not necessary to say that the charge made against his testimony by the proctor for the appellee is without any foundation. His testimony is not in accord with that of Jordan before the United States inspector in many particulars,—in many particulars it does accord with the testimony of Jordan. This man Peterson was the helmsman on the "Samson." He had no interest in the matter, as he steered by the order of the pilot and not upon his own initiative.

Parker, another witness on behalf of the appellant, saw the collision and he too locates the place of the collision. (Apostles, pp. 910 to 939.) *Goodell* (Apostles, pp. 796 to 865), who was aroused by the bell from full speed to full speed astern, rushed on deck and saw the collision, though he did not see the actual impact. He

locates the place of the collision and concurs with Jordan. *Fred Pederson*, oiler and fireman on the "Samson," was an eye witness and testified (Apostles, pp. 1007 to 1051). He was *sitting in the doorway on the port side* of the "Samson" when *he heard the "Henderson" whistle and went out on deck and could not see the "Henderson" or oil barge until he walked forward and got very near the forward end of the house* (p. 1008). He heard all the signals and saw the "Henderson" and oil barge approaching, saw the vessels come together, saw the oil barge go by; indeed, he may be said to be the witness who was in the position to observe everything. Ample opportunity was afforded to cross examine this witness, but his testimony was not at all affected or shaken by the cross examination. This man had been a seafaring man for seven years, was on duty at the time of the accident and was in a position to see everything. It is peculiar that proctor in his brief does not mention or refer to the testimony of this witness, but states boldly that there were only two men on the "Samson" who saw the collision, the courses of the boats, or located the collision near Puget Island,—Jordan and the helmsman, Peterson, whereas the record shows that Pederson, as well as Peterson, the former the oiler and the latter the helmsman on the "Samson," both saw the accident and both were in position to see the courses of the vessels.

The appellee in its brief pays little attention to the "silent evidence" of the rock barges, but much stress is laid upon the testimony of the fishermen as to where they located the rock barges. Something is said about the rock barges while drifting tending toward the Puget Island shore, because at that time they were going under a port helm. It must be remembered that the "Henderson" was backing under a port helm, yet she seemingly swung toward Prairie Channel and the rock barges swung toward Puget Island. The testimony of the fishermen is the oral testimony on behalf of the appellee as to the location of the rock barges. As said in the former brief, these witnesses were unable to state whether or not there was even a light on any of these barges while at anchor. This one fact is sufficient to discredit their evidence. The fact that they testify so positively as to the location of the collision when they admit that they were three-quarters of a mile to a mile away wholly discredits the testimony of these witnesses in all particulars. Furthermore, these "independent" witnesses know so little about what occurred that of two in one boat, *one is positive that he saw only the red light* of the "Samson," and *the other only the green light* of the "Samson." The *other two men in the other boat could not testify that they saw any lights on the "Samson,"* except possibly the range lights. The one thing by which a vessel upon the water on a dark night

is located is the light which it carries, and yet these witnesses are so intelligent that they cannot say that they ever saw any light on any of these barges. On the other hand, the testimony of all the crew of the "Samson" and of the captain of the "Hercules" and of the officers of the "Kern" show conclusively that each of the outside barges carried a white light that night, and the testimony of the officers and crew of the "Samson," including Merjano, the barge man on Barge No. 9, establishes beyond any question where the rock barges were anchored in the morning and the fact that they carried lights. The "silent evidence" of the rock barges, therefore, is most conclusive.

THE DAMAGES

The appellee in its brief seemingly takes a most inconsistent position on the matter of damages. It claims (p. 52) that this was a libel for a total loss, and on page 65 that there should be entered a reasonable allowance for demurrage. Judge Cushman in his opinion admits that "the amount charged for the boats in the salvage appears high," but allows the claim because the appellee "had immediate and urgent need for these boats and had to interrupt other employment in which the boats were engaged in order to secure their services." This the appellant submits is an erroneous basis for the assessment of damages. The reasonable rental value of so

many boats as were necessary for the work of salvage is all to which the appellee is entitled. In a former brief the appellant has shown that this vessel could have been raised for $5,000.00 and that this was a reasonable sum to have been allowed for raising the vessel. It is further shown that the vessel could have been repaired and made as good as it was before the collision for a sum of between $15,000.00 or $16,000.00. Under this evidence, the appellee would not have been entitled to recover for a total loss and would have been entitled to recover the cost of repairing the "Henderson." Even the witnesses for the appellee, as shown in the former brief, admit that the hull could have been repaired, but they say it was "bad business policy to repair the hull, as she could only last two or three years more anyway." The damages, therefore, the appellant submits, should have been limited to the amount which it would have cost to put the "Henderson" in as good condition as she was before the accident. The libel is upon the wrong principle. If the libel had been based upon the facts as proved that the "Henderson" was not a total loss, but was capable of being repaired, then the libellant would have been entitled to recover from the party at fault the amount which it would have reasonably cost to repair the "Henderson," plus demurrage, the demurrage not to exceed the sum which she was earning per diem and demurrage for no longer period than was necessary to raise

the "Henderson" and make the repairs. It is probable that this could have been done in a month at furthest.

Again, the testimony is overwhelming as to the value of the "Henderson" at the time of the collision. The rule of law is recognized by the proctor for the appellee that the true measure of damages in event of the total wreck is the market value of the boat at the time of the collision. Many witnesses testify regarding this. Hosford and Shaver testify entirely as to what the boat would have been worth or was worth to the libellant for the work which the libellant had on hand and in which the boat was engaged. This is no true measure of damages.

Respectfully submitted.
TEAL, MINOR & WINFREE,
ROGERS MacVEAGH,
Proctors for Claimant.